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In the Supreme Court of the United States

OCTOBER TERM, 1962.

No. 751

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY,

Petitioner,

vs.

AGNES KOSOWATZ,
Administratrix of the Estate of Joseph Frank Kosowatz, Deceased,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Court of Appeals for the Eighth Appellate District of the State of Ohio.

EDWIN KNACHEL,
JOHN G. CARDINAL,
1190 Union Commerce Bldg.,
Cleveland 14, Ohio,
Attorneys for Petitioner.

MARSHMAN, HORNBECK, HOLLINGTON,
STEADMAN & MCLAUGHLIN,
Of Counsel.

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To the Court of Appeals for the Eighth Appellate District of the State of Ohio.

Now comes the New York, Chicago and St. Louis Railroad Company, petitioner, by and through its attorneys and respectfully prays that a Writ of Certiorari shall be issued to review the judgment of the Court of Appeals for the Eighth Appellate District of the State of Ohio (Cuyahoga County) entered on April 5, 1962 affirming the judgment of the Court of Common Pleas for Cuyahoga County, Ohio.

OPINION BELOW.

The Court of Appeals for the Eighth Appellate District of the State of Ohio did not write an opinion in affirming the judgment entered upon the verdict of the jury by the Court of Common Pleas for Cuyahoga County, Ohio. The Journal Entry of the Court of Appeals is appended to this petition at page 19.

JURISDICTION.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(3) to review the judgment of the Court of Appeals for the Eighth Appellate District of the State of Ohio affirming the judgment entered upon the verdict of the jury by the Court of Common Pleas for Cuyahoga County, Ohio, in this action which was maintained under and by virtue of Title 45 U. S. C., § 51 et seq., particularly §§ 51, 53 and 59.

The Supreme Court of the State of Ohio entered its order on July 5, 1962 overruling the petitioner's motion for an order directing the Court of Appeals for the Eighth Appellate District (Cuyahoga County, Ohio) to certify its record to the Supreme Court of the State of Ohio. Thereafter, on October 3, 1962 the Supreme Court of the State of Ohio entered its order denying the petitioner's application for rehearing in the cause pending in the Supreme Court of the State of Ohio entitled *Agnes Kosowatz, Administratrix, Plaintiff-Appellee v. New York, Chicago and St. Louis Railroad Company, Defendant-Appellant.*

On January 2, 1963 upon the petitioner's application for extension of time within which to file a petition for a writ of certiorari, this Court entered its order extending the time within which petitioner might file its petition for a writ of certiorari to and including January 17, 1963.

QUESTIONS PRESENTED.

I. Whether the trial court committed error prejudicial to the rights of the petitioner by permitting counsel for respondent to argue to the jury the consideration of the loss of society and companionship as compensable elements of damages assessable against the petitioner in an action for wrongful death maintained under the provisions of the Federal Employers Liability Act.

II. Whether the trial court committed error prejudicial to the rights of the petitioner by overruling its motion to dismiss respondent's first cause of action for the wrongful death of her decedent under the Federal Employers' Liability Act as to the decedent's adult children who, the record discloses, had no pecuniary interest in the continued life of the decedent; and, whether the trial court committed error prejudicial to the rights of the petitioner in overruling its motion to dismiss the respondent's second cause of action for the conscious pain and suffering of her decedent under the Federal Employers' Liability Act in the absence of any evidence that the decedent's injuries were not contemporaneous with his death.

STATUTES INVOLVED.

Title 28 U. S. C. § 1257(3).

§ 1257. *State courts; appeal; certiorari.*

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

* * *

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to

the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

Title 45 U. S. C. § 51.

§ 51. *Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees.*

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as

being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404.

Title 45 U. S. C. § 53.

§ 53. *Contributory negligence; diminution of damages.*

In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. April 22, 1908, c. 149, § 3, 35 Stat. 66.

Title 45 U. S. C. § 59.

§ 59. *Survival of right of action of person injured.*

Any right of action given by this chapter to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury. April 22, 1908, c. 149, § 9, as added Apr. 5, 1910, c. 143, § 2, 36 Stat. 291.

STATEMENT OF THE CASE.

This is an action filed by the administratrix of the estate of a deceased employee of the Petitioner, The New York, Chicago and St. Louis Railroad Company, (hereinafter some times referred to as "Nickel Plate") under the provisions of the Federal Employers' Liability Act (Title 45 U. S. C., § 51 *et seq.*).

The respondent Agnes Kosowatz, is the widow and administratrix of the estate of the petitioner's former employee. The cause was tried upon the respondent's second amended petition and the petitioner's answer thereto. In the respondent's second amended petition she sets forth two causes of action against the petitioner. In the first cause of action respondent claimed damages under the Federal Employers' Liability Act as the surviving and dependent widow of her decedent, and it was alleged that this cause of action was maintained for the dependent widow and the four adult children as the only next of kin of the decedent. Damages were claimed in the second cause of action for the conscious pain and suffering of the decedent.

The case was called for trial on April 11, 1961, before Judge William Ammer, sitting by assignment, and a jury of 12. On April 21, 1961, the jury returned a verdict for the plaintiff in the amount of $25,000.00 upon the plaintiff's first cause of action and $1,450.00 upon her second cause of action. Judgment was entered upon the verdict.

The trial court overruled the petitioner's Motion For New Trial and Motion *Non Obstante Veredicto* on May 17, 1961, and the petitioner thereafter perfected its appeal to the Court of Appeals for the Eighth Appellate District of the State of Ohio (Cuyahoga County) on questions of law.

The Court of Appeals, following briefs and oral arguments, but without writing an opinion, affirmed the judgment of the trial court through its journal entry dated April 5, 1962 (appended hereto at page 19).

On April 24, 1962 Petitioner filed its Notice of Appeal to the Supreme Court of Ohio, and on May 4, 1962 Petitioner filed its Motion For an Order Directing The Court of Appeals To Certify Its Record to the Supreme Court of Ohio. Following the filing of formal briefs and oral arguments the Supreme Court of Ohio overruled Petitioner's Motion For an Order Directing The Court of Appeals To Certify Its Record on July 5, 1962. The petitioner's Application for Rehearing of its Motion To Certify was denied by the Supreme Court of Ohio on October 3, 1962.

The evidence at the trial disclosed that the respondent is the widow (R. 208) and the administratrix of the Estate of Joseph F. Kosowatz (Plaintiff's Exhibit 1, R. 525), and that she maintains this action for the benefit of herself as the dependent widow of Joseph F. Kosowatz and her four adult children (R. 209).

There were no witnesses to the circumstances surrounding the death of the decedent and there is no direct evidence in the record as to how and when Joseph Kosowatz met his death.

Joseph F. Kosowatz, the deceased husband of respondent was employed by the petitioner, The New York, Chicago and St. Louis Railroad Company, as a machinist on February 17, 1958 (R. 51-52), on which date Mr. Kosowatz reported for work (R. 93) at what is known as the Nickel Plate's Campbell Road Yard in the city of Cleveland, Ohio (R. 51, 93).

Mr. Kosowatz arrived for work at about 8:00 A. M. on February 17, 1958 (R. 93) and the day was very cold

and windy (R. 56; 94; 30; Exhibit 2, R. 526). Although Mr. Kosowatz was his own supervisor (R. 53, 94, 254), part of his duties included the unloading of diesel fuel from tank cars for petitioner (R. 94, 255).

Tank car No. UTLK 76374, owned by the Union Tank Car Company, which was spotted on track No. 7 or the unloading dock, was unloaded of its fuel oil on February 17, 1958 (R. 238; Exhibit E-1, R. 548). A fair exhibit of the tank car as it stood on track No. 7 shortly after decedent's body was found is shown by Exhibit B (R. 132, 545).

Between 11:00 A. M. and 11:30 A. M. on February 17, 1958, Joseph Blasik, petitioner's yard clerk and fellow employee of the decedent saw the decedent in the vicinity of the clerk's office (R. 95). At 1:50 P. M. Joseph Blasik placed a call to the police (R. 96) to report that the body of the decedent had been found near the pump house and No. 7 track at the Campbell Road Yard by the petitioner's hostler Phillip R. Ponsford, shortly after he arrived at work at 1:30 P. M. The place where the decedent's body was found is approximately 340 feet from the clerk's office (R. 23).

When Joseph F. Kosowatz was found by Phillip R. Ponsford he was dead (R. 37) and his body was lying about two feet from the pump house (R. 36). The side of his face appeared to be crushed (R. 36) and there were blood spots on and in the pump house (R. 36, 99). The decedent's head was close to track No. 7 and his feet were in the direction of track No. 6 (R. 36). The decedent was lying on his back and his body was rigid (R. 38).

A view of the tank car sitting on Petitioner's track No. 7, the pump house and track No. 6 running immediately in front of the pump house is shown by petitioner's Exhibit D (R. 547).

REASONS FOR GRANTING WRIT.

I. The trial court committed error prejudicial to the rights of the petitioner by permitting counsel for respondent to argue that loss of society and companionship, protector and helpmate are legitimate elements of damages for the consideration of the jury in assessing damages in an action for the death of a railroad employee under the Federal Employers Liability Act.

II. The trial court committed error prejudicial to the right of the petitioner:

A. By failing to dismiss the first cause of action as to the adult children of the decedent whom the evidence disclosed had no pecuniary interest in the continued life of the decedent; or, to instruct the jury that it could not award damages to the adult children of the decedent whom the evidence disclosed suffered no pecuniary loss as the result of the death of the decedent; and,

B. By failing to dismiss the second cause of action when the evidence failed to disclose that any injuries suffered by the decedent was not contemporaneous with his death.

I.

During the course of respondent's counsel's opening argument in his summation to the jury, a large blockboard containing a list of non-compensable elements of damages which was not supported by any record evidence, was placed on a tripod before the jury. When the blockboard was unveiled by respondent's counsel the petitioner immediately objected to the use of the blackboard and to any arguments based upon the improper elements of damages listed thereon. These objections were disposed of by the trial court in the following manner (R. 445, 446):

Mr. Cardinal: I object to the use of the blackboard, your Honor.

The Court: What's all this?

Mr. G. J. McMonagle: Well, Judge, it's just part of my argument. I wrote it out. As far as the use of the blackboard, that's been upheld.

The Court: **Yes, the use of it, but as long as you are using it in evidence.**

Mr. G. J. McMonagle: Well, it's part of my argument, your Honor.

The Court: Well, proceed.

Mr. Cardinal: I object to it, your Honor.

Mr. G. J. McMonagle: As I said, I want to be fair to him. I could have waited until after he had his argument, but I wanted to tell you—**we have here items in evidence here.** There's expectation of life, 13 and a half years. That's the equivalent of 4,927 days that a person would normally be expected to live under these circumstances and part of the consideration that you have—

Mr. Cardinal: May I have an objection to the argument also, your Honor?

The Court: Well, the objection is overruled. You may proceed.

Mr. G. J. McMonagle: That we are talking about here not only loss of wages in connection with this thing. **We are talking about, the pecuniary value of a life is what it comes down to. We are talking about what a husband and father means, and I have recited** here—**Mr. Cardinal can read about them.** I don't want to take up too much time because I want him to have the opportunity—**what I want him to do and that's the reason I did this now is to tell you in his judgment and the judgment of the Nickel Plate Railroad how much a husband who contributes such items as we have in evidence here as a repairman, a plumber, a painter, gardener, a protector, helpmate, the society and companionship to his wife, how much is it worth, how much he can say in here the railroad says.**

This is beyond the normal wages. He can say how much these things are worth per day, what they have been taken away from the persons in connection with this matter.

I will have a few more things to say after Mr. Cardinal has his argument."

A photograph of the blackboard used by respondent's counsel is attached hereto at page 12 and marked Exhibit 1. The respondent's counsel did not offer the blackboard in evidence.

The jury was well aware of the fact, about which the trial court observed and to which respondent's counsel referred, that the list of items on the blackboard was used as evidence. However, even though petitioner's counsel refused to accept the invitation of respondent's counsel to place a value upon the improper elements of damages listed on the blackboard, the trial court again permitted respondent's counsel to use the blockboard as evidence in his closing argument to the jury (R. 469, 470, 471, 472):

"He goes on to say, yes, we admit—they have to prove it. Sure, that's been their attitude in connection with this. They said they are fair. Sure, they admit he died and believe me, so long as he wants to be anxious and considerate of me and my reputation and what we do for you people, **listen, Joseph Kosowatz died for the stockholders of the Nickel Plate Railroad and the Wheeling & Lake Erie Railroad that's part of it and the Norfolk & Western that's combined with it.**

Mr. Cardinal: I object, your Honor.

The Court: I think the argument has gone far afield.

Mr. Cardinal: Of course we are far afield.

Mr. McMonagle: All we ask is that the case be tried on the evidence as presented here and you follow

these exhibits. You consider the men who testified and I'm satisfied, we leave it with you, that the evidence will disclose that had they done what they should have done, this situation wouldn't have existed.

There is evidence in the rules that we read to you that the officers are supposed to supervise these operations, that they are not supposed to place things upon platforms, they are not supposed to carry things up on ladders by themselves, they are not supposed to lay things around there, when we finally get down to it.

Sure, I said to him—anybody can tell you this. What does he mean? They know. He does this all the time. Their firm represents this railroad. **He could say to you, listen, is this husband and father, is he worth, what, five dollars a day or something like that? They could get as ridiculous as that.**

And in my own feeling, the railroad says nothing, just abuse. That's all we've got here. 13 and a half years—

Mr. Cardinal: I object to this line of argument, your Honor.

The Court: Well, overruled.

Mr. G. J. McMonagle: And on a wage basis alone, we talked about maybe **this man is going to live to be 88,** not the one that they have that's going to retire three years or so after. This is just on the wages. **That would come to a total of $67,500 in earnings.** What are these things worth? **What is the protection of a father and a husband—**

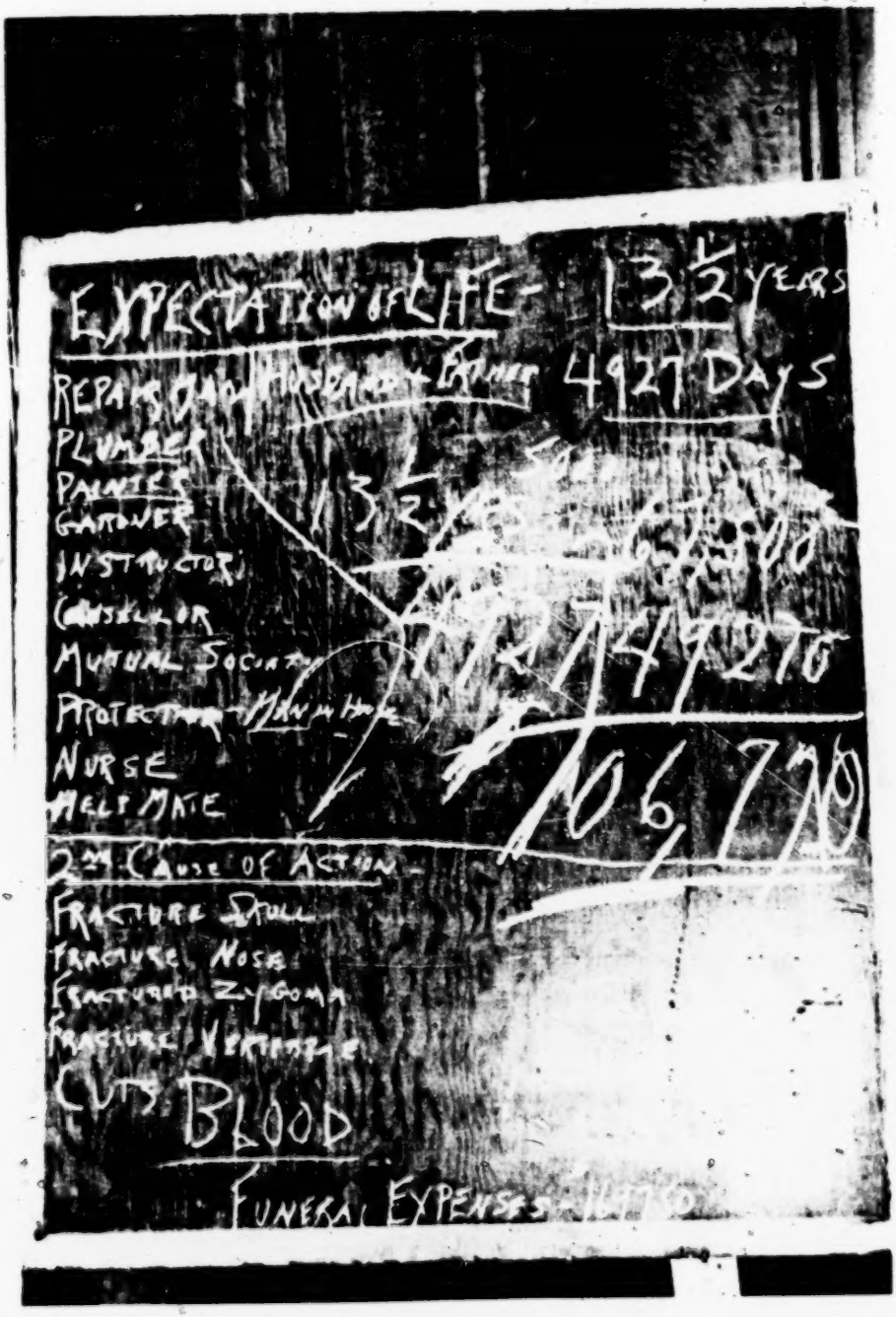
Mr. Cardinal: Do I have a continuing objection, your Honor?

Mr. G. J. McMonagle: **—a plumber—**

Mr. Cardinal: Do I have a continuing objection?

Mr. G. J. McMonagle: Your Honor, **this is all in the evidence.**

The Court: May we please approach the bench?


EXPECTATION OF LIFE- 13½ YEARS
4927 DAYS
REPAIRS
PLUMBER
PAINTER
GARDNER
INSTRUCTOR
COUNSELLOR
MUTUAL SOCIETY
PROTECTION
NURSE
HELP MATE
106,770
2ND CAUSE OF ACTION
FRACTURE SKULL
FRACTURE NOSE
FRACTURED ZYGOMA
FRACTURE VERTEBRAE
CUTS BLOOD
FUNERAL EXPENSES

(Conference at the Bench between Court and counsel out of the hearing of the jury and off the record.)

Mr. G. J. McMonagle: We say that for the 4,927 days—

Mr. Cardinal: May I have an objection, your Honor?

The Court: Well, overruled.

Mr. Cardinal: Overruled. All right, then.

Mr. G. J. McMonagle: —of pecuniary damages, the value of these things, **the value of these things as part of what is lost in connection with this thing is worth $10 a day.** Could I be any cheaper on that? Isn't that little enough for the number of years they figure? That totals $49,270, and **if you add them both up, and these are for your consideration**—you people have to decide this, not me, and **you consider them when you talk about these things**—they total up, and we are talking about a death here, these things total $106,770.

Now, you can take this figure of $10 and say it's worth $2 or $5 or nothing, if you want to, but it has a pecuniary value. It's the value, **the pecuniary value of the life of the decedent in connection with this matter,** and you can take any figures you want as to his expectation of life up to what the law has said or what the evidence shows, 13 and a half years, and when you take those things, you come up with a substantial amount of money. This is the pecuniary damage. **This is the value in money as best anybody can relate it to a living person and what his living is worth to his family and what his value is, what the pecuniary value is, and all I said $10 a day, $10 a day for the period of time that they agree and their expert agrees he'd probably live."**

The prejudice to the petitioner through the misconduct of respondent's counsel in his arguments to the jury, with the approbation of the trial court, is twofold.

First, the jury was invited to speculate upon those elements of damages listed on the blackboard and referred to in respondent's counsel's argument, i.e.: plumber, painter, gardener, protector, helpmate and society and companionship; in the absence of any record evidence of the pecuniary value of such items to either the decedent's widow or adult children. (R. 213, 208-215.)

Second, the jury was invited to speculate upon the pecuniary value of such items as the protection of a husband and father, helpmate and society and companionship which are not only not elements of damages in actions maintained under the Federal Employers' Liability Act, but are items which could not have been supported by evidence. *Michigan Central Railroad Company v. Vreeland*, 227 U. S. 59 (1913); *Rodzik v. New York Central R. Co.*, 169 F. Supp. 803 (E. D. Mich. S. D. 1959).

The propriety of permitting a jury to consider as elements of damages those items which the trial court permitted the jury in this case to consider has been repeatedly condemned by the federal courts since this court announced the principle set forth in *Michigan Central Railroad Company v. Vreeland, supra; American Railroad Company of Porto Rico v. Didricksen*, 227 U. S. 145 (1913); *First Nat. Bank in Greenwich v. National Airlines, Inc.*, 288 F. 2d 621 (2nd Cir. 1961).

II.

A.

The respondent's Second Amended Petition contained two causes of action. The first cause of action was entitled ACTION FOR RECOVERY FOR WRONGFUL DEATH DAMAGES and contained, in part, the following allegation:

> "* * * the said decedent left surviving him Agnes Kosowatz, his widow, who was dependent upon him for her support, and the following persons, his next of kin: Marian Bohacek, daughter, John Kosowatz, son, Mildred Jordan, daughter and Catherine Lepi, daughter, and that the said persons are his only next of kin and heirs at law and for whose benefit this action is brought."

During the course of the trial the decedent's widow and son took the witness stand and together they provided the only evidence in the record of the pecuniary interest that the widow and children had in the continued life of the decedent. This evidence disclosed that the decedent's four children were all adults, maintained their own families, and none received any pecuniary benefit from the decedent during his lifetime. (R. 209, 219, 220.) Only the widow received any pecuniary benefit from the decedent. (R. 219.)

At the close of all of the evidence, the petitioner moved the trial court to withdraw from the jury any consideration of damages for the decedent's four adult children and to dismiss the first cause of action as to the children. The court overruled this motion. (R. 408.)

The trial court not only refused to withdraw from the jury any consideration of damages for the decedent's four children and to dismiss the first cause of action as to them, but instructed the jury that they could award the respondent (R. 509):

"* * * such sum as under all the circumstances of this case will be just compensation for pecuniary loss suffered by the window and the next of kin because of the death of Joseph Frank Kosowatz, which loss has resulted and is reasonably certain to result from the death of said Joseph Frank Kosowatz, an employee of defendant railroad."

The evidence is absolute that the children of decedent received no pecuniary or financial benefit from the decedent after they reached their majority and prior to the decedent's death. (R. 219.)

Inasmuch as the trial court permitted respondent's counsel to exhort the jury to determine the "pecuniary value of a life" (R. 446), the worth of a "husband and father" (R. 446), the value of "the protection of a father and husband" (R. 470), and even to invite petitioner's counsel to indulge in a game of placing a *per diem* value on the life of a "husband and father" (R. 446, 470), the petitioner was certainly entitled to have the jury instructed that the pecuniary interest of the "beneficiaries." "next of kin" or "heirs at law" must be measured by his or her individual pecuniary loss. *Gulf, Colorado and Sante Fe Railway Co. v. McGinnis*, 228 U. S. 173 (1913).

Following the trial court's charge to the jury the petitioner again requested the court to instruct the jury that "* * * no amount of money for damages can be awarded to adult children who are not dependent * * *." The court refused to so instruct the jury (R. 521).

B.

The respondent's second cause of action sets forth in detail the various injuries that were recounted in the autopsy report of the Cuyahoga County Coroner. The respondent then alleges "* * * that the said injuries caused and resulted in Plaintiff's decedent's death; that the plaintiff's decedent suffered a severe mental and nervous shock and the most excruciating pain and mental anguish."

The evidence disclosed that Joseph Blasik last saw Joseph Kosowatz alive some time between 11:00 A. M. and 11:30 A. M. on February 17, 1958. Mr. Blasik further testified that after he was notified by Phillip Ponsford that Mr. Kosowatz's body was near the pump house he called the Cleveland Police Department at 1:50 P. M., February 17, 1958. At the time that Mr. Kosowatz was found he was lying on his back and his body was rigid (R. 38).

The coroner's report (R. 154-155; Exhibit 14 R. 535) sets forth the massive hemorrhages that occurred in the brain of the decedent as the result of an injury to his head. However, there is no evidence in the record as to the time when Joseph Kosowatz sustained the injuries which were found upon his body, nor is there any evidence how long Joseph Kosowatz lived subsequent to those injuries or that he was conscious from the time that he sustained those injuries and the time that he expired.

There is absolutely no evidence, and none was offered, that Joseph Kosowatz suffered any conscious pain or that any pain was not contemporaneous with his death.

At the close of all of the evidence the petitioner moved the trial court to withdraw the second cause of action from the consideration of jury and to dismiss the second cause of action. (R. 408.) The court overruled the motion of the petitioner and charged the jury (R. 511):

"You have a right to consider the mental anguish and suffering and pain that he underwent between the time of the injury and death, which I stated before is limited by the evidence to some three to three and a half hours."

To permit the jury to consider any damages assessable against the petitioner under the second cause of action was not warranted in view of the complete lack of evidence of the time and manner in which Joseph Kosowatz met his death. *Great Northern Railroad Co. v. Capital Trust Company*, 242 U. S. 144 (1916).

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari herein prayed for should be granted.

EDWIN KNACHEL,
JOHN G. CARDINAL,
Counsel for Petitioner.

APPENDIX.

JOURNAL ENTRY OF THE COURT OF APPEALS.

No. 25,678.

IN THE COURT OF APPEALS

STATE OF OHIO, COUNTY OF CUYAHOGA, SS.

AGNES KOSOWATZ, Admrx., etc.,

Plaintiff-Appellee,

vs.

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY,

Defendant-Appellant.

JOURNAL ENTRY.

April 5, 1962.

THIS CAUSE came for hearing upon the appeal on questions of law, assignments of error, bill of exceptions, the transcript, and the original papers and pleadings from the Court of Common Pleas of Cuyahoga County, and was argued by counsel, on consideration whereof the Court finds there is no error apparent on the record in said proceedings and judgment prejudicial to the appellant.

IT IS, THEREFORE, considered by the Court that the judgment of the Court of Common Pleas of Cuyahoga County be, and the same is hereby affirmed, and that the appellee recover from the appellant her costs herein expended.

And the Court being of the opinion that there was reasonable grounds for this appeal, allows no penalty.

IT IS FURTHER ORDERED that a special mandate be sent to the Court of Common Pleas of Cuyahoga County, Ohio for execution upon this judgment.

To all of which appellant, by its counsel, excepts.

Office Supreme Court, U.S.
FILED
FEB 12 1963
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1962.

No. 751.

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY,

Petitioner,

vs.

AGNES KOSOWATZ, ADMINISTRATRIX OF THE ESTATE OF JOSEPH FRANK KOSOWATZ, DECEASED,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

GEORGE J. McMONAGLE,
RICHARD E. McMONAGLE,
1202 Engineers Building,
Cleveland 14, Ohio,
Attorneys for Respondent.

EDWIN KNACHEL,
JOHN G. CARDINAL,
MARSHMAN, HORNBECK, HOLLINGTON, STEADMAN & McLAUGHLIN,
1190 Union Commerce Building,
Cleveland 14, Ohio,
Attorneys for Petitioner.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-9647

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Rules.

Supreme Court Rules 19 and 28	2

In the Supreme Court of the United States

OCTOBER TERM, 1962.

No. 751.

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY,

Petitioner,

vs.

AGNES KOSOWATZ, ADMINISTRATRIX OF THE ESTATE OF JOSEPH FRANK KOSOWATZ, DECEASED,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

JURISDICTION.

There are no special or important reasons why the Supreme Court of the United States should be burdened with any further proceedings in this matter.

The within action was decided by a jury in the Cuyahoga County, Ohio Common Pleas Court and was reviewed and upheld by the trial court by his overruling of the petitioner's Motion for New Trial. The action of the trial court was unanimously affirmed by the Cuyahoga County Court of Appeals.

The petitioner and respondent each filed briefs in the Supreme Court of Ohio upon the filing of petitioner's Motion for an Order to Certify the Record. After the Ohio Supreme Court heard oral arguments by both the petitioner and the respondent, it overruled petitioner's Motion for an Order to Certify the Record and subsequently denied its application for rehearing.

This proceeding does not present any federal question of substance not heretofore determined by the Supreme Court of the United States, and obviously, the state court did not decide any such question nor decide it in a way not in accord with applicable decisions of this Court. There is no such reviewable question presented as is contemplated by Supreme Court Rule 19.

Jurisdiction is closely related to, if not dependent upon, the questions presented. The type of such questions are such as are described in Rule 28 pertaining to questions certified by the Court of Appeals or by the Court of Claims:

> "* * * Questions of fact can not be certified. Only questions or propositions of law may be certified, and they must be distinct and definite."

QUESTIONS PRESENTED.

The two questions that petitioner claims are presented here are neither of the type that the Supreme Court rules contemplate would be the subject of its review. Normally, under the heading "Questions Presented," the petitioner sets forth one or more questions which call for a declaration of law applicable to a certain set of facts, chiefly for the future guidance of the bench and bar of the United States.

Here the petitioner merely asks, as its questions, that the Supreme Court of the United States decide whether or not the trial court committed error prejudicial to the rights of the petitioner. This means (a) Did the trial court err in the respect or respects complained of? and (b) If the trial court did so err, would there have been a contrary result if such error had not occurred?

In order to determine whether the matters complained of were erroneous would require a review of the entire

trial proceedings. Although petitioner's counsel objected to a portion of the argument, evidence upon which the argument was based was submitted by respondent without objection thereto by petitioner's counsel. Also, to determine whether matters complained of were prejudicial would require the Supreme Court of the United States to weigh the evidence herein.

Question No. 1 pertains to the argument of respondent's counsel. The argument pertained to portions of the evidence that were introduced without any objection thereto at the time of its introduction together with inferences properly deductible therefrom. Strangely, petitioner's complaint with reference to Question No. 1 is principally based upon the photog ıph of a blackboard *which, although contained in petitioner's brief herein, admittedly is not contained in, nor is it a part of the Bill of Exceptions* and it can not be a subject of review. Rather than presenting any legal question, this item is concerned with the exercise by the state trial court of its discretion in the conduct of the trial, particularly in connection with an instance invoked by scurrilous, insulting remarks of petitioner's counsel.

Despite contentions of the petitioner, as indicated by Question No. 2, the record definitely discloses that there was no error,—not even non-prejudicial error—committed by the trial court in its action on the motion of the respondent pertaining to the decedent's adult children.

The petition clearly averred that the only one who was dependent upon the decedent was "* * * Agnes Kosowatz, a widow, who was dependent upon him for her support * * *." The only evidence as to dependency was as to the widow. The petition did describe the next of kin who were, of course, the widow and children.

In accordance with the accepted practice, the names and relationship of the next of kin and heirs at law of the decedent were also set out in the petition.

The Second Cause of Action referred to in so-called Question No. 2 was one to recover for the personal injuries suffered by the decedent during his lifetime. This is in accordance with Title 45, U. S. C., Paragraph 59—"Survival of Right of Action of Person Injured"—which right of action is "for the benefit of the surviving widow or husband and children of such employee." While the amount recovered on the wrongful death action is distributed in Ohio by order of the Probate Court, based upon dependency of the survivor or survivors, distribution of the amount recovered for the conscious pain and suffering, so far as the surviving spouse and children are concerned, is not necessarily controlled by dependency but passes as a part of the estate of the decedent as provided by law.

The evidence was overwhelming that the decedent survived his injuries and suffered for an appreciable period of time so there was no error by the trial court in overruling petitioner's motion to dismiss respondent's second cause of action for conscious pain and suffering.

Neither this case, nor the alleged questions involve principles, the settlement of which are of importance to the public, as distinguished from that of the parties. There is no conflict of opinion or authority between courts of appeals.

The Supreme Court of the United States has reiterated time and again its policy with reference to granting the writ of certiorari.

In 1955, in the case of *Rice vs. Sioux City Memorial Park Cemetery*, U. S. Iowa, 1955, 75 S. Ct. 614, 349 U. S. 70, 99 L. Ed. 897, after the writ of certiorari had previously been granted, the court later dismissed it. The syllabus, in part, held:

"* * * The writ of certiorari is dismissed as improvidently granted, since this case is not one in which 'there are special and important reasons' for granting a writ of certiorari as required by Rule 19 of the Rules of this court.

(a) This Court does not sit for the benefit of the particular litigants. (p. 74.)

(b) 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic. (p. 74.)

(c) This is especially true in cases involving constitutional questions. (p. 74.)

(d) It is very important that this court be consistent in not granting the writ of certiorari except in cases including principles, the settlement of which is of importance to the public as distinguished from that of the parties."

In the above cited case, the Court, in its opinion, stated, at page 74:

"This Court does not sit to satisfy a scholarly interest in such issues, nor does it sit for the benefit of particular litigants."

The Court in the above cited case referred to the case of *Layne & Bowler Corporation vs. Western Well Works, Inc.*, 261 U. S. 387 and quoted the words of Mr. Chief Justice Taft, speaking for a unanimous court:

"Certiorari should not be granted except in cases involving principles, the settlement of which is of importance to public, as distinguished from that of parties and in cases where there is a real and embarrassing conflict of opinion and authority between Courts of Appeal."

Another leading case dealing with granting the writ of certiorari is *Magum Co. vs. Coty*, 262 U. S. 159, the syllabus of which in part is as follows:

"§ 2. The jurisdiction to bring up cases from the circuit court of appeals by certiorari was given for the two purposes of securing uniformity of decisions in the circuits and of having questions of importance decided by this court when desirable in the public interest—not for the purpose of giving the defeated party another hearing." (p. 163.)

STATEMENT OF FACTS.

Decedent had been employed by the Nickel Plate Railroad for a great number of years as a mechanic at its Campbell Road yards whose work included the unloading of diesel oil from tank cars, causing it to be pumped into storage tanks. In recent years, storage capacity had been increased from ten thousand to sixty thousand gallons and the staff (R. 273) was cut down from thirteen or fourteen men to seven.

Decedent was required to unload the cars, without a helper, contrary to the usual custom and practice for unloading of such cars in this vicinity. To do this, he was required to go, by ladder, to about the top of a tank car, approximately fifteen to twenty feet above the ground, carrying his tools, a two-inch pipe about sixteen feet long and a large collar, without additional help; to stand upon the metal top of the tank car on a platform with no guard-rails about the dome; to attach the collar to the dome; to insert the pipe into the collar on the dome as shown by the photograph-exhibits; to then bring up another pipe about ten feet long that was on a swivel joint and normally hung loose from a rail about sixteen feet high on the side of a pumphouse in order to connect it with the pipe in the tank car by means of a union. This was required in every operation. Dismantling was done by reversing the process. There was always danger that the pipe and the swivel joint

would swing down by themselves on becoming disengaged or not being held securely.

The facilities provided, and the procedure followed, were contrary to the standard procedure for unloading tank cars and were contrary to the usual customs and practices for doing so. This was due to the fact that these means did not provide a reasonably safe place for the decedent to work, contrary to the standard practices and the usual custom and practice followed for unloading tank cars, which was clearly established by the testimony of A. C. Germaine, a safety engineer, R. 143 to R. 205.

His testimony was not only that the procedure followed and the facilities provided did not provide a safe place for the decedent to work, but that the standard practice was to provide a platform separate and apart from the tank car itself with adequate flooring, runways and railings on which and from which to assemble and disassemble the attachments to the top of the tank car, to provide at least one helper for the man required to do this work upon a tank car that had no platforms and guard rails; to provide arm supports or counterweights so that the pipe on the swivel did not suddenly drop, sway or swing.

He identified plaintiff's Exhibits 17, 18, 19, 21, 22 and 27 as the customary type of installations. He also identified Exhibits 15, 16 and 25 as tank cars containing the fixed type of platform. None of these were provided to the plaintiff's decedent in this case.

Defendant did not offer any testimony to refute plaintiff's testimony that the practices and procedures followed were in accordance with the usual standards, customs and practices.

February 17, 1958 was a day about seven degrees below zero; it was cold and windy and the snow was blow-

ing up. The decedent was found, about 2:15 P. M., lying dead near a tank car which then had been completely unloaded and the swivel pipe swung against the pumphouse; the wrench of the decedent was still on top of the tank car; the collar had rolled off to the side of the tank car; a wrench was lying in some blood near the side of the tank car; there was blood against the upright rail at the rear of the pumphouse; a large pool of blood near the base of the tank car; a path of blood along the ground and on the side of the pumphouse leading into the pumphouse where decedent's blood-covered glasses were found; a bloody path out of the pumphouse where a glove was in front of it and where he was lying on his back, dead, his body frozen stiff. The bloody trail clearly indicated a fall from the unprotected top of the tank car against the upright steel rail and then to the ground. He had staggered about, apparently into the pumphouse where there was a telephone and, finally, with no one around to help him, died from the injuries sustained in the fall; he was last seen about 11:30 A. M. No one went to look for him before he was found dead.

The evidence further established that the platform, near the top of the dome, had protruding, uneven, steel heads about it and was slippery.

Dr. Lester Adelson, the deputy Cuyahoga County Coroner, testified that the decedent had a fracture of the left zygoma, fracture of the nose, a pair of black eyes, lacerations of the nose and chin, scrapes on the forehead and his face was covered with black dirt; there were fractures of the vault, which is the top part of the skull and also the floor of the skull, bruising of the front part of the brain; hemorrhage of the brain and a broken neck.

The injuries were such as would result from a person falling and striking his face against a solid object.

The doctor further testified:

At R. 159:

"The injuries resulted most likely as a result of a fall from a height."

At R. 160:

"He had to fall from an elevation. He couldn't sustain this type and combination and degree of injury merely falling from his own height, in other words, slipping on the ground. He had to be somewhere off the ground."

John Whalen, the relief foreman, testified that when the decedent was on duty (R. 140), he was the only one that unloaded tank cars and while doing so worked high above the ground.

R. 146:

"Q. About 12 feet. Now, sir, the work of unloading tank cars required Joseph Kosowatz to work at elevations higher than his own height, did it not?

A. That's right.

Q. All right, sir. And the only work about the pump house or the tank cars that required him to work at such elevations was on the tank cars themselves, isn't that right?

A. Right."

The evidence was conclusive that decedent was killed when he either fell or was blown from the top of a tank car when he was not provided with a reasonably safe place to work. The evidence disclosed that, at the time of the accident, the defendant's supervisors were aware of what had actually happened.

George Tuttle, the assistant car foreman testified that he was called to make an inspection of the car.

R. 284:

"A. The General Yard Master, Cermak, called by phone and told me to go down to the oil shed, that a man had been *killed down there, fell off a car and was killed*, so I went down and looked at the car."

The jury returned a verdict on the First Cause of Action of the plaintiff's petition, which was for the wrongful death of the decedent, in the amount of Twenty-Five Thousand Dollars ($25,000.00) and on the Second Cause of Action, which was for conscious pain and suffering in the amount of One Thousand Four Hundred Fifty Dollars ($1,450.00).

ARGUMENT.

Not only does petitioner fail to show where this matter involves principles, a settlement of which are of importance to the public as distinguished from that of the parties, or it is a case where there is a real and embarrassing conflict of opinion and authority between Courts of Appeals, but it fails to specifically demonstrate that the matters complained of herein are erroneous and that, but for their occurrence, the jury would have brought back a verdict contrary to that which it did.

There is no contention that the jury did not have ample grounds upon which to return its verdict or that the amount of $25,000 arising out of the wrongful causing of the death of the decedent is excessive or not in accordance with the evidence. Should the writ be allowed, the Supreme Court of the United States would have no pronouncement or enunciation of law to make for the guidance of any of the trial courts in the nation.

Three state courts, including the highest court of the State of Ohio failed to find that there was any prejudice to petitioner resulting from the argument of plaintiff's coun-

sel which, in part, was in response to scurrilous and insulting remarks of petitioner's lawyer.

Counsel for petitioner has attached a picture to its brief. This item, however, is not contained in the Bill of Exceptions and even if it added anything to petitioner's appeal, which it does not, the Court, of course, could not properly consider it.

All of the matter discussed in the argument bearing upon the question of damages was in accordance with the evidence and such reasonable inferences that could be drawn from it. Petitioner has no basis to complain about any portion of the argument.

Certainly the decedent was referred to as a husband and father, the companion and helpmate of his wife. Such were the facts and were developed by the evidence.

Counsel for the petitioner, in his argument, which, of course, followed the first part of the respondent's argument, decided that the way to win this lawsuit, regardless of the facts, was to castigate respondent's counsel and to reflect upon the integrity of both respondent's counsel and witnesses. These tactics instilled a little heat.

Some of petitioner's counsel's arguments are quoted hereafter.

The Mr. Phillips he refers to is a member of the Cleveland Police Department, who was the first officer on the scene following the death of the decedent, being dispatched by the police department radio.

Mr. Germaine is a safety engineer who had followed his profession for forty-five years. He had been President of the American Society of Safety Engineers, member of its organization for over thirty years, had been employed as the Safety Engineer by the United States Steel Corporation and for five and a half years was an enforcement officer of safety practices for the Industrial Commission of

Ohio. The jury found these witnesses to be truthful and honest.

Here is what petitioner's counsel said:

R. 447:

> "When I first started, I said that I would not be able to dramatize this case and I had in mind Mr. McMonagle's show which I have seen many times. * * *
>
> Mrs. Kosowatz, I have the utmost sympathy for them. I come myself from a large, tight family into which tragedy has crept. We were not advised by an eloquent and an emotional advocate to determine what we wanted. We got what we took. Nothing more."

R. 450:

> "Now, if there were any defects, any deficiencies in that car, there are criminal prosecutions which can be made against the railroad, but they do not appear in this petition. * * *
>
> Now, whether or not any of these pictures of the installations for loading and unloading were ever identified, this jury doesn't, nor do I, know, nor does Mr. McMonagle know because there is no evidence on that point."

This statement was untrue. The testimony did identify the installations shown in the pictures which were in evidence.

Plaintiff's Exhibit 19 was identified as the installation of the Erie Railroad Company.

R. 182:

> "Q. Well, Mr. Germain, have you examined the facilities of the Erie Railroad diesel plant for unloading tank cars? * * *
>
> A. They have the platform that I spoke of and the hinged platform to get over onto the top of the tank car."

R. 183:

"Q. Well, what is that a picture of, what installation? (referring to Plaintiff's Exhibit 19).

A. This is the one at the Erie Railroad.

Q. All right. The one you described?

A. On 55th, yes. It's only a few feet from 55th Street. You can see it from the road as you go by."

R. 453:

"But it seems to me that if convenience of Mr. McMonagle's case had required Mr. Phillips to find the dome board on the other side of the car, which, as you all can see, there is none, if it suited his convenience to have it slippery, it would have been slippery."

R. 454:

"Now, Mr. Germain did make some statements about this being a dangerous situation or a hazardous situation. I have no more comment on that except that we have Courts of Appeals that will take care of situations like that where I find myself.

Mr. G. J. McMonagle: Objection, your Honor. Objection.

The Court: Overruled."

R. 455:

"Mr. Cardinal: I merely point out that Mr. McMonagle's witnesses will make statements which are contrary to fact and which are convenient for his purpose."

Prior to the argument (R. 408), Specification of Negligence No. 7 was withdrawn from the jury by counsel for the respondent. In argument, petitioner's counsel had this to say with reference to the withdrawal by Mr. McMonagle:

"That's Specification No. 7. That is an example of what I'm trying to point out that there is absolutely no evidence. He had no evidence. He can say anything in

this and he said anything and he will say anything in argument. Now, he comes in and he attempts, after including this in his opening statement of all of this tripe we are accused of, he comes in and he asks the Court if he can take Page 3 out and leave that out and why? Because even he can see how ridiculous he looks."

R. 460:

"Mr. Germain specifically stayed away, or maybe more correctly, he was told to stay away, from all of the other railroad installations in Cuyahoga County."

R. 461:

"What I would like to convey to the jury is that no matter what would have been convenient for Mr. McMonagle's case, Mr. Phillips would have found it."

R. 462:

"Mr. McMonagle said that he has procured a man who could be relied upon, Mr. Germain. I have spoken about Mr. Germain and I think he is in the same category as Mr. Phillips. We have been admonished, where is our safety engineer? Well, the Interstate Commerce Commission is our safety engineer, the only ones that we can have."

In view of the foregoing, petitioner's counsel can hardly complain about the discussion of the evidence contained in respondent's argument.

There is no occasion for dissecting decisions based upon matters wholly different from those shown by the complete record in this action. Actually the legal contentions of the petitioner are incorrect based on a record as contended by it.

We consider it an understatement to say that there are no special or important reasons to grant the writ herein. Surely, the petitioner is not asking that the Supreme

Court of the United States weigh the evidence in matters such as the instant case.

It is further submitted that the record herein does not reflect any proceedings that would warrant a review of the instant case by the Supreme Court of the United States.

The petition herein did not allege any claim of dependency by anyone other than the widow.

The only evidence of dependency presented in the trial of the case was as to the surviving spouse. Agnes Kosowatz, the respondent, testified at R. 208 that she was the widow of the decedent; that he made his home with her and her daughter Catherine and her children; that her husband supported her; that his earning were about $5000 a year.

At R. 211 she testified that her husband worked regularly most of the time.

The verdict of $25,000 can hardly be said to represent more than the pecuniary interest the widow had in the life of her deceased spouse.

Title 45, U. S. C., Paragraph 51 provides in part:

> "Every common carrier by railroad * * * shall be liable in damages * * * in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee * * *."

Title 45 U. S. C., Paragraph 59 provides:

> "Any right of action given by this act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee. * * *"

In a case where there is any dispute as to the question of dependency, the amount recovered for wrongful death is apportioned, in Ohio, by the Probate Court of the county in which the decedent resides. However, an amount re-

covered by the personal representative as a result of injuries suffered by the decedent prior to his death does not require apportionment based upon dependency. With an intestate decedent, the probate proceedings require the designation of the surviving spouse and the listing of the next of kin. The name, therefore, of the surviving spouse and of the next of kin in the petition herein is, therefore, proper and the failure or refusal to emasculate the petition is not prejudically erroneous.

The respondent herein is Agnes Kosowatz, the administratrix and it is difficult to see how an action could be dismissed as to persons who are neither plaintiff nor defendant therein. The Court correctly charged the jury that the recovery in this case is limited to such sum as, under the *circumstances in this case*, will be just compensation for the pecuniary loss suffered by the widow and next of kin because of the death of Joseph Frank Kosowatz.

The only averment as to dependency herein was as to the widow, the only testimony as to dependency was as to the widow, and since the court limited the recovery to such sum, as under the circumstances in this case, would be just compensation for the pecuniary loss suffered, it is ridiculous to contend that the jury went beyond the averments of the petition, the evidence, and the instructions of the court in arriving at its verdict.

It seems to be the contention of the petitioner that the jury erroneously included improper amounts in its verdict. Petitioner fails to point out anything in the record that would indicate this to be the fact. The verdict certainly does not reflect any such situation.

It can not be said, even by taking matters completely out of context, that respondent's counsel engaged in any improper argument inconsistent with the evidence in this

case, even under the stress of heat gendered by the scurrilous and insulting remarks of the petitioner's counsel.

In the second part of Question II (II B), the petitioner seemingly contends that a substantial federal legal question is presented which requires an enunciation of the law applicable thereto by the Supreme Court of the United States for guidance of courts of the nation. Actually, the petitioner is asking in this item that the Supreme Court of the United States weigh the evidence presented to the jury in the trial of this action and determine whether or not the finding of the jury that the decedent did endure pain and suffering between the time he was injured and the time of his death was against the manifest weight of the evidence. It is elementary that this is hardly a function to be performed by this Court. However, there is no error in the trial court's refusal to upset the finding of the jury with respect to the Second Cause of Action of respondent's petition. The facts in this case establish that the decedent was last seen alive at about 11:00 to 11:30 A. M. on February 17, 1958. About 2:00 P. M., his body was found near the pumphouse on No. 7 track in the petitioner's Campbell Road yard. The suffering endured by the decedent following the sustaining of his injuries is obvious from the bloody trail observed by the witnesses.

At R. 107:

There was a large amount of blood on a ladder indicating decedent had fallen; a path of blood established that the decedent was able to arise from the point where he had fallen, stagger alongside of a pumphouse, on a path that was easily followed from the blood he shed along the way, into the pumphouse itself where he bled further and then outside, where his bloody gloves were discovered, then to a spot in the yards where he fell onto his back and bled to death.

When he was found, his nose and mouth were filled with frozen blood.

Conscious pain and suffering prior to his expiration could almost have been measured. The jury allowed very little for such suffering because the amount of its verdict on the Second Cause of Action was for only $1450.00.

CONCLUSION.

The trial of this action before the Cuyahoga County Court of Common Pleas and jury required about two weeks time to complete. In practically every contested case which extends as long as this one did, some harmless error may occur. No prejudicial reversible error occurred in the trial of this case.

Petitioner has had a thorough review of the trial proceedings by both the Cuyahoga County Court of Appeals and the Supreme Court of the State of Ohio.

The petitioner has failed to show that this case presents any novel or unsettled questions of law or any issues of sufficient importance to consume the time of the Supreme Court of the United States. Any further delay in the termination of this lawsuit will result in hardship and injustice to the surviving spouse.

It is, therefore, respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

GEORGE J. MCMONAGLE,
RICHARD E. MCMONAGLE,
Attorneys for Respondent.